Tengku Reza Shah bin Tengku Chaidzir Shah v Bangsar Heights Pavilion Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-1–01 OF 2024
SHAMSULBAHRI IBRAHIM J
10 JUNE 2024

Civil Procedure — Injunction — Mareva injunction — Plaintiff obtained ex parte Mareva injunction order — Defendant applied to set aside ex parte Mareva injunction order — Whether plaintiff had good arguable case — Whether plaintiff should have filed application for Mareva injunction in Court of Appeal — Whether plaintiff's suit estopped by res judicata — Whether plaintiff had locus standi to commence action — Whether defendant had assets within jurisdiction — Whether there was real risk that assets would be dissipated — Rules of Court 2012 O 29 rr 1 & 2

The plaintiff was the majority shareholder of Brumasi Holdings Sdn Bhd (in liquidation) ('Brumasi'). Brumasi initially owned four pieces of land known as Lots 6894, 6895, 6896 and 2960 ('the land'). Lots 6895 and 6896 were transferred to Asiapura Sdn Bhd ('Asiapura') whereas Lots 6894 and 2960 were sold by the then liquidator of Brumasi to Soh Yuh Min who in turn transferred the said lots to Brumaci Holdings Sdn Bhd ('Brumaci'). There were multiple legal actions in relation to the land, inter alia: (a) Suit 171 by Asiapura against multiple parties including Brumasi and Brumaci for an order that the transfer of Lots 6894 and 2960 was invalid, but upon the appointment of the new liquidator of Brumasi known as William, the parties entered into consent judgment to the effect that the ownership of the land shifted to Bangsar Heights Pavilion Sdn Bhd ('the defendant') for the defendant to develop the land; (b) Suit 258 filed by the plaintiff against several parties including Brumasi and Brumaci, in which the High Court found that there was an element of fraud in the sale of Lots 6894 and 2960 and as such, the court ordered the defendants in Suit 258 to pay damages to the plaintiff; and (c) the appeal against the High Court's decision in Suit 258 in only allowing the relief in the form of damages ('the said appeal'). Pending the said appeal, the plaintiff applied and subsequently obtained ex parte Mareva injunction pursuant to O 29 rr 1 and 2 of the Rules of Court 2012 against the defendant to prevent the defendant from: (a) developing Lots 6894 and 2960; (b) advertising, marketing and/or promoting any sale of units, receiving booking or deposit monies, and entering into any sale and purchase agreements from third parties involving Lots 6894 and 2960; (c) charging or mortgaging Lots 6894 and 2960; and (d) paying 19% of the gross sales value of the development of the land to Bumaci. The defendant on the other hand filed the application in encl

12 to set aside the ex parte order. The issues to be determined by the court were: (a) whether the plaintiff had a good arguable case — regarding this issue, the defendant argued that the ex parte Mareva injunction order ought to be set aside because the plaintiff lacked a good arguable case based on the following reasons: (1) the plaintiff should have filed the application for Mareva injunction at the Court of Appeal; (2) the plaintiff's suit was estopped by the principle of res judicata because all issues regarding the land had been duly ventilated and decided in Suit 258 and now pending appeal; (3) Brumasi was wound up and only its liquidator was entitled to commence and maintain the present suit; and (4) the plaintiff was an undischarged bankrupt; (b) whether the defendant had assets within the jurisdiction; and (c) whether there was a real risk that the assets would be dissipated.

Held, allowing the Mareva injunctions order to remain and dismissing the defendant's application to set aside the order with costs:

(1) To establish a good arguable case, the plaintiff was required to establish his case no greater than 50% chance of success. Nonetheless, the case should be more than just a mere possibility and capable of serious argument. In the present case, the court found that the plaintiff had successfully established a good arguable case. The crux of the dispute in this action was on the status of Lots 6894 and 2960. Firstly, the fraudulent transfer of the said lots was confirmed by the Johor Bahru High Court. Further, the judge in Suit 258 clearly decided that the then Brumasi's liquidator failed to comply with the provisions in the Companies Act and its rules when entering the consent judgment which resulted the ownership of the two lots shifted to the defendant. In addition, the documentary evidence also disclosed that the Winding Up Court had found that the then Brumasi's liquidator was guilty of misconduct in handling the liquidation of Brumasi's assets. Based on the above observations, the court held that the plaintiff's case was more than barely capable of serious argument (see paras 24–27).

(2) There was no basis for the principle of res judicata to be applicable in the present action. The reason for the plaintiff to narrate the chronology of events on Lots 6894 and 2960 in the present case was not for the court to decide on the status of such lots but simply to explain on how these two lots fell into the defendant's hands and to injunct the defendant from further dealing with the lots pending the decision of the Court of Appeal. Thus, there would be no multiplicity of decisions (see para 28).

(3) On the defendant's argument that the plaintiff should have filed the application for Mareva injunction at the Court of Appeal, the court found that the argument also was unfounded. Since the power to grant a Mareva injunction was within the jurisdiction of the present court, there was no hindrance for the plaintiff to file such application in the

present court. It was pertinent to note that because of the important to preserve an asset from being disposed or dealt, a Mareva injunction could be applied at any time when necessary (see paras 29–30).

(4) Regarding the defendant's argument that only Brumasi's liquidator was entitled to commence and maintain the present suit as the company was wound up, again the court found this argument was misconceived. The plaintiff had duly obtained the sanction from Brumasi's liquidator vide a letter dated 24 July 2023. By having this sanction, the plaintiff was competent to commence this action. Likewise, the status of the plaintiff as an undischarged bankrupt did not affect the plaintiff's locus standi since the Insolvency Department had given its sanction to him via its letter dated 19 July 2023 (see paras 31–32).

(5) Regarding the second criteria for the Mareva injunction to remain, there was no doubt that the land which comprised of Lots 6894 and 2960 was now owned by the defendant and within the jurisdiction of the court (see para 33).

(6) Regarding the third criteria, the court found that the following facts disclosed sufficient evidence to support the plaintiff's allegations that Lots 6894 and 2960 were in imminent danger and the dissipation of these lots was real and not a bare allegation: (a) the land was being developed by the defendant into a 29-storey building complex; (b) the defendant had been offering for sale a number of units in the development project to public and a sales office had been erected on the land where brochures about units were distributed; (c) the defendant had advertised the sale of units in the development project vide the *Star Online* on 5 June 2023; and (d) the defendant had received RM10,000 from a purchaser by the name of Woon Gee Teng as the payment of deposit for a unit known as A-25-21 on 2 July 2023 (see paras 34–35).

(7) As a conclusion, after judicious consideration of all the evidence before the court, both oral and documentary, and submissions of all parties, the court found that all criteria for the grant of Mareva injunction were met. No doubt that the present case was a suitable case for such injunction to be made to ensure that the assets were not dissipated by the defendant (see para 36).

[Bahasa Malaysia summary

Plaintif merupakan pemegang saham majoriti Brumasi Holdings Sdn Bhd (dalam pembubaran) ('Brumasi'). Brumasi pada mulanya memiliki empat bidang tanah yang dikenali sebagai Lot 6894, 6895, 6896 dan 2960 ('tanah tersebut'). Lot 6895 dan 6896 telah dipindahkan kepada Asiapura Sdn Bhd ('Asiapura') manakala Lot 6894 dan 2960 telah dijual oleh penyelesai Brumasi ketika itu kepada Soh Yuh Min yang seterusnya memindahkan lot-lot tersebut kepada Brumaci Holdings Sdn Bhd ('Brumaci'). Terdapat pelbagai tindakan

undang-undang berhubung tanah tersebut, antara lain: (a) Saman 171 oleh Asiapura terhadap beberapa pihak termasuk Brumasi dan Brumaci untuk perintah bahawa pemindahan Lot 6894 dan 2960 adalah tidak sah, tetapi selepas pelantikan penyelesai baharu bagi Brumasi yang dikenali sebagai William, pihak-pihak memasuki penghakiman persetujuan yang mengakibatkan pemilikan tanah tersebut beralih kepada Bangsar Heights Pavilion Sdn Bhd ('defendan') bagi membolehkan defendan membangunkan tanah tersebut; (b) Saman 258 yang difailkan oleh plaintif terhadap beberapa pihak termasuk Brumasi dan Brumaci, di mana Mahkamah Tinggi mendapati terdapat unsur fraud dalam penjualan Lot 6894 dan 2960 dan oleh itu, mahkamah memerintahkan defendan-defendan dalam Saman 258 untuk membayar ganti rugi kepada plaintif; dan (c) rayuan terhadap keputusan Mahkamah Tinggi dalam Saman 258 yang hanya membenarkan relif dalam bentuk ganti rugi ('rayuan tersebut'). Sementara menunggu rayuan tersebut, plaintif memohon dan seterusnya memperoleh injunksi Mareva yang diperoleh secara ex parte menurut A 29 kk 1 dan 2 Kaedah-Kaedah Mahkamah 2012 terhadap defendan untuk menghalang defendan daripada: (a) membangunkan Lot 6894 dan 2960; (b) mengiklankan, memasarkan dan/atau mempromosikan apa-apa penjualan unit-unit, menerima wang tempahan atau deposit, dan memasuki apa-apa perjanjian jual beli dari pihak ketiga yang melibatkan Lot 6894 dan 2960; (c) mencagarkan atau menggadaikan Lot 6894 dan 2960; dan (d) membayar 19% daripada nilai jualan kasar pembangunan tanah tersebut kepada Bumaci. Defendan sebaliknya memfailkan permohonan dalam lampiran 12 untuk mengenepikan perintah ex parte tersebut. Isu-isu yang perlu diputuskan oleh mahkamah ialah: (a) sama ada plaintif mempunyai kes yang boleh dipertikaikan yang baik — berhubung isu ini, defendan berhujah bahawa perintah injunksi Mareva ex parte tersebut perlu diketepikan kerana plaintif tidak mempunyai kes yang boleh dipertikaikan yang baik berdasarkan alasan-alasan berikut: (1) plaintif sepatutnya memfailkan permohonan untuk injunksi Mareva di Mahkamah Rayuan; (2) saman plaintif dihalang oleh prinsip res judicata kerana semua isu mengenai tanah tersebut telah dibincangkan dan diputuskan dengan sewajarnya dalam Saman 258 dan kini menunggu rayuan; (3) Brumasi telah digulung dan hanya penyelesainya berhak untuk memulakan dan mengekalkan saman semasa; dan (4) plaintif adalah seorang yang bankrap yang belum dilepaskan; (b) sama ada defendan mempunyai aset yang berada dalam bidang kuasa mahkamah; dan (c) sama ada terdapat risiko sebenar bahawa aset tersebut akan dilesapkan.

Diputuskan, membenarkan perintah injunksi Mareva tersebut untuk kekal dan menolak permohonan defendan untuk mengenepikan perintah tersebut dengan kos:

(1) Untuk mewujudkan suatu kes yang boleh dipertikaikan yang baik, plaintif dikehendaki membuktikan kesnya tidak lebih daripada 50%

peluang untuk berjaya. Namun begitu, kes tersebut seharusnya lebih daripada sekadar kemungkinan semata-mata dan mampu dihujahkan secara serius. Dalam kes ini, mahkamah mendapati bahawa plaintif telah berjaya mewujudkan kes yang boleh dipertikaikan. Inti pati pertikaian dalam tindakan ini adalah mengenai status Lot 6894 dan 2960. Pertamanya, pemindahan secara fraud lot-lot tersebut telah disahkan oleh Mahkamah Tinggi Johor Bahru. Selanjutnya, hakim dalam Saman 258 dengan jelas memutuskan bahawa penyelesai Brumasi ketika itu gagal mematuhi peruntukan dalam Akta Syarikat dan peraturan-peraturannya apabila memasuki penghakiman persetujuan tersebut yang menyebabkan pemilikan dua lot tersebut beralih kepada defendan. Selain itu, keterangan dokumentar juga mendedahkan bahawa Mahkamah Penggulungan telah mendapati bahawa penyelesai Brumasi ketika itu bersalah atas salah laku dalam mengendalikan pembubaran aset Brumasi. Berdasarkan pemerhatian di atas, mahkamah memutuskan bahawa kes plaintif adalah lebih daripada sekadar mampu untuk dihujahkan secara serius (lihat perenggan 24–27).

(2) Tiada asas untuk prinsip res judicata diguna pakai dalam tindakan semasa. Alasan plaintif untuk menceritakan kronologi peristiwa berkaitan Lot 6894 dan 2960 dalam kes ini bukanlah untuk mahkamah memutuskan status lot tersebut tetapi semata-mata untuk menjelaskan bagaimana kedua-dua lot ini jatuh ke tangan defendan dan untuk menghalang defendan daripada terus berurusan dengan lot berkenaan sementara menunggu keputusan Mahkamah Rayuan. Oleh itu, tidak akan ada kepelbagaian keputusan (lihat perenggan 28).

(3) Mengenai hujahan defendan bahawa plaintif sepatutnya memfailkan permohonan injunksi Mareva di Mahkamah Rayuan, mahkamah mendapati hujahan tersebut juga tidak berasas. Memandangkan kuasa untuk memberikan injunksi Mareva adalah dalam bidang kuasa mahkamah semasa, tiada halangan untuk plaintif memfailkan permohonan sedemikian di mahkamah semasa. Adalah penting untuk diambil perhatian bahawa kerana pentingnya untuk mengekalkan aset daripada dilupuskan atau diuruskan, injunksi Mareva boleh dimohon pada bila-bila masa apabila perlu (lihat perenggan 29–30).

(4) Berkenaan hujahan defendan bahawa hanya penyelesai Brumasi berhak untuk memulakan dan mengekalkan saman semasa kerana syarikat tersebut telah digulung, sekali lagi mahkamah mendapati hujahan ini tidak berasas. Plaintif telah dengan sewajarnya mendapat sanksi daripada penyelesai Brumasi melalui surat bertarikh 24 Julai 2023. Dengan adanya sanksi ini, plaintif adalah kompeten untuk memulakan tindakan ini. Begitu juga, status plaintif sebagai bankrap yang belum dilepaskan tidak menjejaskan locus standi plaintif memandangkan

Jabatan Insolvensi telah memberikan sanksi kepadanya melalui suratnya yang bertarikh 19 Julai 2023 (lihat perenggan 31–32).

(5) Berkenaan kriteria kedua untuk injunksi Mareva kekal, tidak terdapat keraguan bahawa tanah tersebut yang terdiri daripada Lot 6894 dan 2960 kini dimiliki oleh defendan dan dalam bidang kuasa mahkamah (lihat perenggan 33).

(6) Berkenaan kriteria ketiga, mahkamah mendapati fakta-fakta berikut mendedahkan keterangan yang mencukupi untuk menyokong dakwaan plaintif bahawa Lot 6894 dan 2960 tersebut berada di ambang bahaya dan pelesapan lot-lot ini adalah nyata dan bukan dakwaan kosong: (a) tanah tersebut sedang dibangunkan oleh defendan menjadi kompleks bangunan 29 tingkat; (b) defendan telah menawarkan beberapa unit dalam projek pembangunan tersebut untuk dijual kepada orang ramai dan sebuah pejabat jualan telah didirikan di atas tanah tersebut di mana risalah tentang unit-unit telah diedarkan; (c) defendan telah mengiklankan penjualan unit-unit dalam projek pembangunan tersebut melalui *Star Online* pada 5 Jun 2023; dan (d) defendan telah menerima RM10,000 daripada pembeli bernama Woon Gee Teng sebagai bayaran deposit untuk unit yang dikenali sebagai A-25-21 pada 2 Julai 2023 (lihat perenggan 34–35).

(7) Sebagai rumusan, selepas pertimbangan kehakiman ke atas semua keterangan lisan dan dokumentar di hadapan mahkamah, dan penghujahan semua pihak, mahkamah mendapati bahawa semua kriteria untuk pemberian injunksi Mareva telah dipenuhi. Tidak syak lagi bahawa kes ini adalah kes yang sesuai untuk injunksi sedemikian dibuat bagi memastikan aset-aset tersebut tidak dilesapkan oleh defendan (lihat perenggan 36).]

Cases referred to

Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614; [2020] 9 CLJ 449, FC (refd)

Lee Kai Wuen & Anor v Lee Yee Wuen [2022] MLJU 3411; [2022] 7 CLJ 505, CA (refd)

Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad B Hj Hassan & Ors [2005] 1 MLJ 654; [2004] CLJU 699; [2004] 1 LNS 699; [2004] 4 AMR 30, HC (refd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 228
Companies Winding-Up Rules 1972 r 47

A Rules of Court 2012 O 29 rr 1, 2

Mohd Fairuz Abdullah (Mohd Najid & Partners) for the plaintiff.
Dinesh Kanavaji (with Zaim Zhafri bin Azhar, Taqrir Akramin bin Khalib and Sarah Annesa bt Ahmad Jamal) (Taqrir Akramin & Co) for the defendant.

B

Shamsulbahri Ibrahim J:

INTRODUCTION

C **[1]** These are applications filed by the plaintiff and the defendant in encls 5 and 12 respectively relating to the plaintiff's Mareva injunction.

[2] In encl 5 the plaintiff filed an ex parte application seeking for a number of Mareva injunctions against the defendant under O 29 rr 1 and 2 of the Rules D of Court 2012 ('the ROC'). The detail of the Mareva injunctions sought are as follows:

1. *Satu Perintah Injunksi Mareva menghalang Defendan dari melakukan semua kerja-kerja pembangunan ke atas lot 6894 and lot 2960 Mukim Bandar Johor Bahru, Negeri Johor yang merupakan 13/25 bahagian tanah* E *tersebut dikenali sebagai Grn 400157 Lot 23008 Bandar Johor Bahru Negeri Johor sehingga keputusan Mahkamah Rayuan terhadap kes guaman sivil 258 dan/atau keputusan tindakan yang difailkan.*

2. *Satu Perintah Injunksi Mareva menghalang Defendan dari mengiklankan memasarkan dan/atau mempromosi sebarang penjualan unit-unit,* F *menerima wang tempahan atau deposit dan memasuki sebarang perjanjian jual beli dari pihak ketiga melibatkan lot 6894 and lot 2960 Mukim Bandar Johor Bahru, Negeri Johor yang merupakan 13/25 bahagian tanah tersebut dikenali sebagai Grn 400157 Lot 23008 Bandar Johor Bahru Negeri Johor sehingga keputusan Mahkamah Rayuan terhadap kes guaman sivil 256* G *dan/atau keputusan tindakan yang difailkan.*

3. *Satu Perintah Injunksi Mareva menghalang Defendan dari mencagarkan atau menggadai lot 6894 and lot 2960 Mukim Bandar Johor Bahru, Negeri Johor yang merupakan 13/25 bahagian tanah tersebut dikenali sebagai Grn 400157 Lot 23008 Bandar Johor Bahru Negeri Johor sebagai sekuriti* H *sehingga keputusan Mahkamah Rayuan No J-01(NCvC)-814-11/2022 dan/atau keputusan tindakan sivil yang difailkan ini.*

4. *Satu Perintah Injunksi Mareva menghalang Defendan dari membuat bayaran sebanyak 19% dari nilai jualan kasar projek pembangunan di atas tanah tersebut dikenali sebagai Grn 400157 Lot 23008 Bandar Johor Bahru* I *Negeri Johor kepada Bumaci Holdings Sdn Bhd sehingga keputusan Mahkamah Rayuan No J-01(NCvC)-814-11/2022 dan/atau keputusan tindakan sivil yang difailkan.*

[3] On 7 February 2024, I allowed the ex parte application and Mareva

injunctions order has been entered against the defendant. Subsequently, on 15 February 2024, the defendant filed an application in encl 12 to set aside the ex parte order.

BRIEF BACKGROUND FACTS

[4] As a background, the plaintiff is the majority shareholder of Brumasi Holdings Sdn Bhd (in liquidation) ('Brumasi'). Brumasi was the registered proprietor of a land held under Grn 400157 Lot 23008 Bandar Johor Bahru Negeri Johor ('the land') which originally comprising of four lots known as Lots 6894, 6895, 6896 and 2960 Mukim Bandaran Johor Bahru.

[5] Vide a letter dated 19 September 1994, Majlis Bandaraya Johor Bahru approved the planning permission applied by Brumasi for the land to be developed into a 29-storey building complex.

[6] On or about 1995, Brumasi had taken a loan from Bank Bumiputra Malaysia Bhd and charged 12/25 share of the land (involving Lots 6895 and 6896) to the bank for the purpose of the loan.

[7] The charge later was taken over by Danaharta Urus Sdn Bhd ('Danaharta') which on 15 June 2004, sold the two lots (Lots 6895 and 6896) to Asiapura Lands Sdn Bhd ('Asiapura') for a purchase price of RM4.25m. Nevertheless, the balance of 13/25 share of the land (Lots 6894 and 2960) remained in favour of Brumasi.

[8] Brumasi was wound upon 12 April 2001.

[9] On 17 June 2019, Teo Cheng Hua, the then liquidator of Brumasi sold Lots 6894 and 2960 to Soo Yuh Mian for a purchase price of RM500,000. Soo Yuh Mian is the majority shareholder of Bumaci Holdings Sdn Bhd ('Bumaci'). On 27 August 2010 Lots 6894 and 2960 were transferred to Bumaci.

[10] On 28 October 2014, Asiapura filed the Suit No JA-22NCvC-171–10 of 2014 ('Suit 171') at the Johor Bahru High Court against five parties namely Kang Hock Hin, Pendaftar Hakmilik Negeri Johor, Gavin Low Peng Kuang, Brumasi, Teo Cheng Hua and Bumaci seeking for a few reliefs, inter alia, the transfer of Lots 6894 and 2960 between Brumasi to Bumaci on 27 August 2010 was invalid.

[11] On 10 April 2017, Teo Cheng Hua was replaced by William Santosh John ('William') as the new liquidator of Brumasi.

[12] Less than four months after the appointment of William as the liquidator of Brumasi, on 27 August 2017, he and the rest of the parties in the Suit 171 agreed to enter a consent judgment ('consent judgment') which terms are as follows:

(a) the defendant to pay Asiapura a sum of RM45m as the full and final settlement for Asiapura's share in Lots 6895 and 6896;

(b) Kang Hock Hin, Brumasi and Bumaci to surrender Lots 6894 and 2960 to the defendant;

(c) Asiapura, Kang Hock Hin, Brumasi and Bumaci confirm that defendant is entitled to carry out a development project ('development project') on the land;

(d) Brumasi and Bumaci to give their respective irrevocable power of attorneys in favour of the defendant to develop the land;

(e) although Brumasi and Bumaci have a common right in the joint venture agreement to develop the land with the defendant, Brumasi agrees that only Bumaci is entitled to receive the interest in the form of settlement payment of 19% deducting from RM45m paid to Asiapura and Brumasi agrees to not receive any payment and no right, interest or claim on the payment;

(f) the defendant agrees that Kang Hock Hin and Bumaci have right to sell 19% of the units in the development project after receiving any notice from Asiapura or Brumasi or the progress of the development project has reached 50%; and

(g) the defendant has to commence the development project within four months after the approval of the building plans.

[13] The plaintiff averred there were elements of fraud in the recoding of consent judgment based on the following reasons:

(a) William had entered into the consent judgment without authority since he failed to comply with the provision of s 228 of the Companies Act 1965 and r 47 of the Companies Winding-Up Rules 1972 as confirmed by the Insolvency Department of Johor Bahru vide its latter dated 22 July 2018;

(b) the defendant was not even a party in the Suit 171 but suddenly was agreed by all parties in the proceedings to be appointed as the developer developing the land; and

(c) the defendant was agreed by all parties to receive interest, benefits and rights on the entire land.

[14] Disagreed with William's action in the recording of the consent judgment which detrimental to Brumasi's interest, on 28 January 2018, the plaintiff filed an application at the Johor Bahru High Court to remove William as Brumasi's liquidator. On 9 December 2018, this application was allowed.

[15] Dissatisfied with the consent judgment, on 17 December 2018, the plaintiff filed Suit No JA-22NCvC-258–12 of 2018 ('Suit 258') at the Johor Bahru High Court against Asiapura, Kang Hock Hin, Pendaftar Hakmilik Negeri Johor, Gavin Low Peng Kuang, Brumasi, Teo Cheng Hua, Bumaci, Soo Yuh Mian and Messrs TS Chong & Co. In this Suit 258, the plaintif sought the following reliefs, inter alia:

(a) a declaration that the sale and purchase agreement dated 17 June 2009 entered into between Brumasi and Bumaci and Soo Yuh Mian was void and invalid;

(b) a declaration that the transfer of Lots 6894 and 2960 from Brumasi to Bumaci on 27 August 2010 was void and invalid;

(c) an order that Lots 6894 and 2960 be registered in favour of Brumasi; and

(d) a declaration that the consent judgment dated 27 August 2017 in the Suit 171 was void and invalid.

[16] On 11 October 2022, the Johor Bahru High Court held that there was an element of fraud in the sale of Lots 6894 and 2960 and ordered that Kang Hock Hin, Bumaci and Soo Yuh Mian to pay damages which to be assessed by the court to the plaintiff.

[17] As the Johor Bahru High Court only allowed the relief in the form of damages to be paid to the plaintiff and not the return of Lots 6894 and 2960, on 7 November 2022 the plaintiff filed an appeal to the Court of Appeal vide No J-01(NCvC)(W)-814–11 of 2022. To date, the appeal is still pending for decision.

[18] On 8 August 2023, the plaintiff filed another suit against the defendant vide Suit No JA-22NCvC-91–08 of 2023 at the Johor Bahru High Court. On 10 September 2023 the plaintiff obtained an ex parte Mareva injunction order against the defendant fixed and the inter parte hearing of the Mareva injunction order had been fixed on 15 November 2023.

[19] Nevertheless, according to the plaintiff, on 10 October 2023 Kang Hock Hin who admitted representing all interested parties in the development project met the plaintiff to discuss on the ex parte Mareva injunction order. As a result of the meeting, the plaintiff agreed to sign a settlement agreement dated 10 October 2023 wherein the settlement would take place as follows:

(a) stage 1 — Kang Hock Hin to pay the plaintiff an *earnest money* of RM200,00;

(b) stage 2 — the plaintiff:

(i) to withdraw all suits and injunction with no order as to costs, caveats relating to the land;

(ii) to inform the relevant government authorities that the plaintiff has no objection for the developer (the defendant) to proceed with construction of the project until completion;

(iii) to undertake and give irrevocable undertaking to the developer not to further take any legal proceeding and or do any act that will hinder the construction of the project; and

(c) stage 3 — upon completion of stage 2 by the plaintiff which has to be done within a week after the receipt of the earnest money:

(i) Kang Hock Hin is to pay RM1m to the plaintiff;

(ii) upon signing of the settlement agreement, Kang Hock Hin is to pay RM1.8m to the plaintiff;

(iii) Kang Hock Hin is to pay RM4.5m to the plaintiff on or before 11 February 2024; and

(iv) Kang Hock Hin is to pay RM4.5m to the plaintiff on or before 11 May 2024.

[20] However, the plaintiff averred that the defendant refused or failed to sign the settlement agreement and this led the plaintiff to file this present action.

THE LAW ON MAREVA INJUNCTION

[21] Abdul Malik Ishak J had succinctly explained the principle and objective of Mareva injunction in *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad B Hj Hassan & Ors* [2005] 1 MLJ 654; [2004] CLJU 699; [2004] 1 LNS 699; [2004] 4 AMR 30 where the Lordship said:

> It goes without saying that this court has the jurisdiction to grant an interlocutory injunction restraining the disposal of property over which the particular plaintiff has a proprietary claim. *A Mareva injunction too would restrain the particular defendant from disposing of, or even merely dealing with, the assets of the particular plaintiff which were assets over which the particular plaintiff asserts no proprietary claim but which after judgment those assets may be attached in order to satisfy a money judgment.* More often than not, when the day of judgment arrives, the particular plaintiff may not be able to enjoy the fruits of that judgment fully or at all because of dissipation. To prevent this, a Mareva injunction is the answer to it. It is an

injunction where the particular defendant may be prevented from dissipating such assets and in the words of Lord Donaldson MR in *Derby & Co Ltd v Weldon (No 3 & 4)* [1990] Ch 65 at p 76 (CA) and Nicholls LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 3) (The 'Coral Rose')* [1991] 1 WLR 917 at p 929 'a defendant is not permitted to thwart in advance orders which the court may make'. Indeed the width and breadth of a Mareva injunction is beyond imagination. A Mareva injunction may even be granted where the particular plaintiff does not even claim any interest in the assets and merely 'seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim' (per Lord Mustill in *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929 at p 939). So it is not uncommon for a Mareva injunction to be granted in a wide varying fact situation. Its grant is not confined to merely preventing the removal or disposal of assets so as to defeat a judgment but it also includes terms securing a particular property where the particular plaintiff asserts a proprietary or tracing claim. Indeed a Mareva injunction is all encompassing. It could be used to restrain the disposal of assets within the jurisdiction as well as without. For this proposition, reference should be made to the case of *Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft mbH und Co KG (The Niedersachsen)* [1984] 1 All ER 398; [1983] 2 Lloyd's Rep 600 (CA).

[22] The principles and legal framework governing the application of a Mareva injunction are well-established. The Court of Appeal case of *Lee Kai Wuen & Anor v Lee Yee Wuen* [2022] MLJU 3411; [2022] 7 CLJ 505 laid out the three main criteria that need to be met. Darryl Goon JCA when delivering the judgment of the court said:

(1) To secure a Mareva injunction, *three vital ingredients* must be established, namely: (i) that the applicant had *a good arguable case*; (ii) that the respondent had *assets within the jurisdiction*; and (iii) that there was *a real risk that the assets would be dissipated* or placed beyond the reach of the applicant before judgment. That the appellants had assets within the jurisdiction was not a fact in dispute. The main ingredients that gave rise to serious contentions were whether there existed a good arguable case in favour of the respondent and whether there was a real risk that the appellants would dissipate or dispose of their assets to defeat any judgment that may be entered in the respondent's favour. (paras 56, 58 & 60)

WHETHER THE PLAINTIFF HAS A GOOD ARGUABLE CASE

[23] The defendant contended that the ex parte Mareva injunction order has to be set aside as the plaintiff lacks of good arguable case based on the following reasons:

(a) all issues regarding the land including Lots 6894 and 2960 had been duly ventilated and decided in the Suit 258 on 11 October 2022. Since the plaintiff had brought these issues on appeal to the Court of Appeal, the plaintiff should have filed the application for Mareva injunction at the Court of Appeal and not to file a new suit in this high court simply to obtain Mareva injunctions against the defendant;

(b) this plaintiff's suit is estopped by the principle of res judicata as all issues regarding the land including Lots 6894 and 2960 had been duly ventilated and decided in the Suit 258 and now pending at the Court of Appeal;

(c) Brumasi was wound up and only its liquidator is entitled to commence and maintain this suit and thus, the plaintiff lacks locus standi; and

(d) the plaintiff is an undischarged bankrupt.

[24] To establish a good arguable case, the plaintiff is required to establish his case no greater than 50% chance of success. Nonetheless, the case should be more than just a mere possibility and capable of serious argument. In *Lee Kai Wuen & Anor,* the Court of Appeal held:

> [61] As the learned judge quite rightly pointed out, *in order to establish a good arguable case, it was not necessary that the applicant's case has to have a better than 50% chance of success, although it has to be more than barely capable of serious argument*. In the words of Mustill J in *Ninemia Maritime Corporation* at p 404 of the report above-cited, which was reiterated by the Federal Court in *S & F International Limited* at p 64:
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> > ... I consider the right course is to adopt the tests of a good arguable case, in the sense of a case which is *more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success*.
>
> [62] In the decision of this court in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754 at p 5 (MLJ); at p 759 (CLJ), Haidar Mohd Noor JCA delivering the judgment of the court used the phrase, 'a fair chance' of success. This was how Haidar Mohd Noor JCA put it:
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> > What is a good arguable case is difficult to define. The respondents need not show that they have a case so strong as to warrant summary judgment nor even a strong prima facie case. It would generally be sufficient if the respondents can show on the evidence available, there is a fair chance that they will obtain judgment against the appellants (see *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398, on appeal to CA [1984] 1 All ER 413; [1983] 1 WLR 1412).

[25] Back to the instant case, upon perusal the cause papers, I find that the plaintiff has successfully established a good arguable case. The reasons are as below.

[26] It is crystal clear that the crux of the dispute in this action is on the status of Lots 6894 and 2960 which are now in the midst of being developed by the defendant. The narrative of facts shows how these two lots were fraudulently transferred from Brumasi to the defendant. It is not a bare allegation by the plaintiff but the fraud was confirmed by the Johor Bahru High Court. Justice

Murad Abdul Aziz in the Suit 258 clearly decided that the then Brumasi's liquidator failed to comply with the provisions in the Companies Act and its rules when entering the consent judgment which resulted the ownership of the two lots shifted to the defendant. Not only that, the documentary evidence exhibited by the plaintiff also disclosed that the Winding-Up Court on 10 April 2017 found that the then Brumasi's liquidator was guilty of misconduct in handling the liquidation of Brumasi's assets.

[27] Based on the above observations, I have no doubt to hold that the plaintiff's case is more than barely capable of serious argument.

[28] On the issue of res judicata raised by the defendant, I find that there is no basis for the principle is applicable in the present action. The reason for the plaintiff to narrate the chronology of events on Lots 6894 and 2960 here was not for this court to decide on the status of such lots but simply to explain on how these two lots fell into the defendant's hands and to injunct the defendant from further dealing with the lots pending the decision of the Court of Appeal. Thus, there would be no multiplicity of decisions as advocated by the defendant facts.

[29] On the defendant's argument that the plaintiff should have filed the application for Mareva injunction at the Court of Appeal, I find that the argument also is unfounded. I am of the view that as the power to grant a Mareva injunction is within the jurisdiction of this court, there is no hindrance for the plaintiff to file such application here. At this point I find instructive the Federal Court case of *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 where it was stated by Eusoffe Abdoolcader FJ in the following passage:

> *We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court Judge and not the appellate court whose function initially is one of review only*, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd v Sirs* (6); *Hadmor Productions Ltd v Hamilton* (7); *Garden Cottage Foods Ltd v Milk Marketing Board* (8). These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p 1421; [1984] 1 All ER at p 418) where Kerr LJ, in delivering the judgment of the court stated that recent decisions of the House have emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

[30] It is pertinent to note that because of the important to preserve an asset

from being disposed or dealt, a Mareva injunction can be applied at any time when necessary. This is underscored in *Metrowangsa Asset Management Sdn Bhd & Anor,* where it was held:

> Of pertinence would be this. *That a Mareva injunction may be granted where it appears to the court that it is 'just and convenient to do so' and it may even be granted at any time*. According to Jessel MR in *Day v Brownrigg* [1878] 10 Ch D 294 at p 307 that the words 'just or convenient' in the statutory provision must be read as 'just, as well as convenient'. It is also ideal to refer to the case of *Beddow v Beddow* [1878] 9 Ch D 89 at p 93. Moreover those words do not mean that the court can grant an injunction simply because it thinks that it is convenient to do so but rather those words mean that the court should grant an injunction for the protection of rights or the prevention of injury according to the legal principles (*Aslatt v Southampton Corpn* [1880] 16 Ch D 143 at p 148).

[31] Regarding the defendant's argument that only Brumasi's liquidator is entitled to commence and maintain this suit as the company was wound up, again I find this argument is misconceived. The plaintiff had duly obtained the sanction from Brumasi's liquidator vide a letter dated 24 July 2023. By having this sanction, the plaintiff is competent to commence this action. This is fortified by the Federal Court case of *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449 where Vernon Ong Lam Kiat FCJ when delivering the judgment of the court said:

> [20] Similarly, if a company is wound up by an order of court, the board of directors becomes functus officio. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. *Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so*. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually impose conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.
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> [21] At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding against a wound-up company. This situation is governed by s 226(3) of the 1965 Act/s 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company. *The second scenario is where action or proceeding is taken by a wound up company:* ss 236(2)(a) and 236(3) of the 1965 Act/s 486 of the 2016 Act *read together with* Part I of the Twelfth Schedule *which requires the sanction of the*

liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario.

[32] Likewise, the status of the plaintiff as an undischarged bankrupt. This does not affect the plaintiff's locus standi since the Insolvency Department had given its sanction to him via its letter dated 19 July 2023.

WHETHER THE DEFENDANT HAS ASSETS WITHIN THE JURISDICTION AND WHETHER THERE IS A REAL RISK THAT THE ASSETS WOULD BE DISSIPATED

[33] Regarding the second criteria for the Mareva injunction to remain, there is no doubt that the land which comprises of Lots 6894 and 2960 is now owned by the defendant and within the jurisdiction of this court.

[34] On the third criteria ie that there is a real risk that the assets would be dissipated, I find that the following important facts:

(a) the land is being developed by the defendant into a 29-storey building complex;

(b) the defendant has been offering for sale a number of units in the development project to public and a sales office has been erected on the land where brochures about units are distributed;

(c) the defendant has advertised the sale of units in the development project vide the *Star Online* on 5 June 2023; and

(d) the defendant has received RM10,000 from a purchaser by the name of Woon Gee Teng as the payment of deposit for a unit known as A-25–21 on 2 July 2023. The selling price of this unit is RM714,000.

[35] I find that the above facts disclose sufficient evidence to support the plaintiff's allegations that Lots 6894 and 2960 are in imminent danger and the dissipation of these lots is real and not a bare allegation.

CONCLUSION

[36] As a conclusion, after judicious consideration of all the evidence before me, both oral and documentary, and submissions of all parties, I find that all criteria for the grant of Mareva injunction are met. No doubt that this is a suitable case for such injunction to be made to ensure that the assets are not dissipated by the defendant. Thus, I allow the Mareva injunctions order to remain and I dismiss the defendant's application to set aside the order with costs.

The court allowed Mareva injunctions order to remain; the defendant's application to set aside order dismissed with costs.

Reported by Dzulqarnain bin Ab Fatar